U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

D-7

[redacted]

FILE: SRC 02 109 54673 Office: TEXAS SERVICE CENTER Date: AUG 03 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

PUBLIC COPY

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Florida that is operating as an import and export business. The petitioner claims that it is a subsidiary of the beneficiary's foreign employer, located in Kingston, Jamaica, West Indies. The petitioner now seeks to extend the beneficiary's stay for two years.

The director denied the petition concluding that the beneficiary would not be employed by the U.S. entity in a primarily managerial or executive capacity.

On appeal, counsel states that Citizenship and Immigration Services (CIS) erred in determining the beneficiary was not eligible for classification as an L-1A intracompany transferee, and in concluding that the beneficiary's duties are not executive or managerial. Counsel submits a brief in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The issue in the present proceeding is whether the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

(1) Manages the organization, or a department, subdivision, function, or component of the organization;

(2) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(3) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(4) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

(1) Directs the management of the organization or a major component or function of the organization;

(2) Establishes the goals and policies of the organization, component, or function;

(3) Exercises wide latitude in discretionary decision-making; and

(4) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner stated on the nonimmigrant petition, filed February 20, 2002, that the beneficiary would perform the following job duties in the U.S. entity: direct company operations with the authority to hire and fire; engage in executive decision-making; direct the company's financial policies and growth strategy; perform due diligence; and manage outsourced professional services.

The director subsequently issued a request for evidence on April 5, 2002, requesting that the petitioner submit a statement describing the staffing of the U.S. organization and evidence that the petitioning organization is doing business in the United States. Specifically, the director asked that the petitioner provide the number of employees employed by the petitioner, including any contract employees, the petitioner's hours of operation, a description of the employees' work schedules, and an explanation as to who performs the day-to-day operations of the business. The director also requested invoices and shipping receipts from February 20, 2001 through February 20, 2002.

In a response dated May 2, 2002, the petitioner stated that the U.S. organization currently employs three individuals: the beneficiary, a sales-export manager, and an administrative assistant. The petitioner provided a similar description of the beneficiary's job responsibilities as the one listed above, and included that the beneficiary would negotiate export and procurement agreements for U.S. goods and services on behalf of the Jamaican parent company. The petitioner described the sales-export manager's job duties as directing and coordinating the business' day-to-day operations, where as the administrative assistant would be responsible for answering telephones and correspondence, packaging, coordinating the shippers and contract workers, and maintaining the company's calendars and schedules. The petitioner also submitted the U.S. organization's articles of incorporation, lease, invoices from January through December 2001, Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Income Tax for December 31, 2001, IRS Form 1120, U.S. Corporation Income Tax Return for the years 2000 and 2001, and six monthly invoices from a staffing service identifying the use of contract employees.

In a decision dated September 11, 2002, the director explained that when a company has a limited number of employees, it is questionable "whether the operator of the business is engaged *primarily* in managerial or executive duties." (Emphasis in original). The director further explained that in such a situation, CIS may reasonably conclude that a wide range of daily functions associated with running a business will be performed by the beneficiary. The director stated that in the instant matter, the petitioner employs three individuals on a full-time basis, including the beneficiary, and "periodically" employs two or three contract employees. The director therefore concluded that with such a small staff it is likely the beneficiary would perform many non-managerial or non-executive job duties associated with running the business. The director consequently denied the petition.

In an appeal filed October 7, 2002, counsel contends that the petitioner submitted extensive documentation, such as job descriptions, a business lease, a bank account confirmation, invoices, and advertisements, supporting the claim that the beneficiary is employed in a qualifying capacity. Counsel states that the beneficiary's experience and knowledge were instrumental in the start-up of the U.S. operation, including exporting goods, training staff on import and export documentation and procedures, and negotiating contracts with U.S. suppliers. Counsel asserts that while employed by the foreign entity, the beneficiary was engaged in extensive executive decision-making.

Counsel also contends that the director's denial "is not in conformance with prior [CIS] processing, " as the L visa classification is available to small qualifying organizations. Counsel cites the Foreign Affairs Manual section 41.54, note 7.5 in support of the assertion.

On review, the record is not persuasive in establishing that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

The petitioner did not provide a sufficient description of the beneficiary's job duties to substantiate the petitioner's claim that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(14)(C) and (D). Although specifically requested by the director, the petitioner submitted a description that included essentially the same job duties that had been previously listed on the nonimmigrant petition. Many of the job duties, such as "direct all company operations," "authority to hire and fire," "engage in executive decision making [sic]," and "perform due diligence," are general and simply restate the criteria in the regulatory definitions of managerial capacity and executive capacity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(B) and (C). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd.*, 724 F. Supp. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Moreover, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner therefore failed to meet its burden of providing "a detailed description of the services to be performed" by the beneficiary. *See* 8 C.F.R. § 214.2(l)(3)(ii).

Counsel correctly notes on appeal that the L-1A classification is available to both large and small organizations. However, the record does not support a finding that the reasonable needs of the petitioning organization would be met by the employment of the beneficiary and two other individuals. Section 101(a)(44)(C) of the Act provides that if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a 1-year-old import and export company. The firm employed the beneficiary as president, plus a sales-export manager and an administrative assistant. The petitioner provided documentation that the U.S. organization had also previously used contract workers on a temporary basis. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president and two employees. Rather, it is reasonable to assume from the record that the beneficiary would not be relieved from performing non-managerial and non-executive job duties. For example, the petitioner claimed that the beneficiary would direct the company's financial policies, yet did not identify any personnel who would be responsible for carrying out the financial policies. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Moreover, the petitioner states that it employs shippers and contractors. However, as noted by the director, the record contains only six invoices from an employment agency for services performed by contract workers in December 2000, and January, February, April, May and July 2001. The evidence indicates that the petitioner's most recent use of contract workers was more than six months prior to the filing of the nonimmigrant petition. Neither the petitioner nor counsel has provided additional documentation demonstrating that the petitioner would continue to employ contract workers who would perform a portion of the organization's daily operations. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not provided sufficient documentation to establish this essential element of eligibility.

Based on the foregoing analysis, the record does not establish that the petitioning organization, after one year from the date of approval of the petition, is able to support the beneficiary in a primarily managerial or executive capacity. For this reason, the appeal will be denied.

Beyond the decision of the director, the minimal documentation of the beneficiary's position abroad raises the issue of whether the beneficiary was employed by the foreign company in a qualifying capacity as required in the regulation at 8 C.F.R. § 214.2(l)(3)(v)(B). On the nonimmigrant petition, the petitioner provided a broad description of the beneficiary's job duties that essentially restates the criteria in the regulations. Again, merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd.*, 724 F. Supp. at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Also, the petitioner submitted a general organizational chart for the foreign company, yet failed to identify the beneficiary as chief executive officer. It is therefore unclear what position the beneficiary previously held in the foreign organization. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). For this additional reason, the appeal will be denied.

An additional issue not addressed by the director is whether the foreign and U.S. entities are qualifying organizations as required in section 101(a)(15)(L) of the Act. The petitioner provided three of the U.S.

corporation's stock certificates, two of which reflect an issuance of 20,000 and 6,000 shares of common stock to the beneficiary's foreign employer, and one which was cancelled. The stock's par value is identified as $1.00 per share. Schedule L of the petitioner's corporate tax return for the year 2001 reflects common stock in the amount of $20,000, rather than the supposedly correct amount of $26,000. As neither stock certificate is dated, it is unclear whether the 6,000 additional shares of stock were issued to the beneficiary's foreign employer in 2002, and therefore would not be included in common stock for the year 2001. Regardless, the petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Id.* Again, the appeal will be denied for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.